No. 96-1168

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RODNEY DANGERFIELD, an individual,

Petitioner,

—v.—

STAR EDITORIAL, INC., a corporation, and GP GROUP, INC., a corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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March 25, 1997

QUESTIONS PRESENTED

I. Whether certiorari is warranted to consider whether the United States District Court for the Central District of California (Ronald S.W. Lew presiding) (the "District Court") properly denied, and whether the United States Court of Appeals for the Ninth Circuit (hereinafter, the "Ninth Circuit") properly affirmed the denial of, Petitioner's post-trial motion to amend the complaint in this action to allege that defendant-respondent Star Editorial, Inc. ("SEI") is the alter ego of defendant-respondent American Media Operations, Inc. ("AMOI") when the issue of alter ego was not litigated by the parties?

II. Whether certiorari is warranted to consider whether the District Court properly dismissed, and whether the Ninth Circuit properly affirmed the dismissal of, the claims against AMOI after a trial on the merits when that defendant did not participate in the publication of a libel concerning a public figure, and thus did not publish the libel with actual (or constitutional) malice as mandated by this Court in *New York Times Co. v. Sullivan* and when no alternative theory of holding this defendant liable was litigated?

III. Whether certiorari is warranted to consider whether the District Court and the Ninth Circuit properly declined to assess punitive damages against SEI when plaintiff-petitioner did not present evidence of that defendant's net worth or financial condition?

LIST OF PARTIES AND RULE 29(b) STATEMENT

1. Petitioner Rodney Dangerfield was the plaintiff and appellant below.

2. At all times since the commencement of this action, respondent Star Editorial, Inc. ("SEI") was a corporation whose responsibilities included preparing the editorial content of *Star* magazine.

3. Respondent American Media Operations, Inc. ("AMOI") (or GP Group, Inc. ["GP Group"]) is the parent corporation of SEI. During the pendency of this litigation, the name of GP Group was changed first to Enquirer/Star, Inc. and then to American Media Operations, Inc. AMOI is a wholly-owned subsidiary of American Media, Inc. ("AMI"). AMI issues shares of stock to the public. The terms AMOI and GP Group shall be used interchangeably throughout this brief.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

Respondents Star Editorial, Inc. ("SEI") and American Media Operations, Inc. ("AMOI") (formerly known as GP Group, Inc.) (collectively "Respondents") submit this brief in opposition to the petition of Rodney Dangerfield ("Dangerfield" or "Petitioner")—a well-known comedian—for a writ of certiorari (the "Petition").

This Petition is Dangerfield's fourth attempt to obtain a reversal of the District Court's order which denied him punitive damages in this libel case.[1] The Petition simply presents no basis for this Court's review. At the District Court level, Judge Ronald S.W. Lew, after a non-jury trial, awarded Dangerfield only $2 in compensatory damages for injury to his reputation and for emotional distress, $45,000 in presumed damages and *no* punitive damages. Dangerfield's post-trial motion for a new trial was denied. On appeal, the factual and legal basis for such award were unanimously affirmed by the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") and Dangerfield's motion for a rehearing was denied. Although the Petition attempts to set forth the relevant considerations for this Court's review while claiming that this case somehow satisfies those considerations, the Petition merely recites again the exact same arguments about factual and legal error that were wholly rejected by both courts below. There is no constitutional issue involved here and there is no conflict between the decisions of the lower courts and any other Court of Appeals or state court of last resort. Certiorari should accordingly be denied.

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[1] The decisions in this case have not been published in any official or unofficial reporter.

STATEMENT OF THE CASE

Dangerfield commenced the instant action on or about March 20, 1991. Jurisdiction in the District Court was based on the diversity of the citizenship of the parties pursuant to 28 U.S.C. § 1332(a). In his complaint, Dangerfield claimed he was libeled by an article published in the September 20, 1990 issue of *Star* headlined "Vegas Casino Accuses Caddyshack Funnyman: Rodney Dangerfield Swills Vodka by the Tumblerful, Smokes Pot All Day and Uses Cocaine" (the "Article"). (CR 46).[2]

After a bench trial, the District Court issued an opinion, dated January 18, 1995 (App. E at 20a-27a)[3], which held that the Article was defamatory *per se* (App. E at 23a), that Dangerfield conceded that he was a public figure (*id.*), that Dangerfield had demonstrated that the defamatory material in question was false and had been published with constitutional malice. (App. E at 24a).

The District Court entered judgment against SEI and in Dangerfield's favor in the amount of $45,002 (App. F at 28a and 29a), awarding Dangerfield one dollar for emotional distress, one dollar for injury to reputation, and presumed damages of $45,000. (App. F at 28a-29a). The District Court held that Dangerfield failed to show that the Article caused him extensive emotional distress in that he never discussed the Article with his psychotherapist and could not even remember the contents of the Article. (App. E at 25a). The District Court further held that Dangerfield failed to prove that the Article caused extensive damage to his reputation holding that "plaintiff's reputation was injured through his own impetuous and uncontrolled behavior and through other

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2 References preceded by "CR-" are to the docket number contained in the Clerk's Record in the District Court.

3 References to "App." are to the Appendix filed with the Petition in this case.

sources." (App. E at 25a). The District Court also refused to award punitive damages against SEI holding that Dangerfield had "failed to submit evidence showing that the financial net worth of the Star would allow the imposition of punitive damages." (App. E at 26a).

The District Court held that liability could not attach to AMOI, granting AMOI's motion for judgment on partial findings under Rule 52(c) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") because "plaintiff has failed to show that GP Group, now known as the American Media Operations, Inc., was sufficiently involved in the publication of the article" and that "there is no evidence that GP Group took a responsible part in causing the article to be published". (App. E at 22a). On that basis, the District Court entered an order dismissing defendant AMOI from the case. (App. E at 22a; App. G at 31a).

On or about February 2, 1995 Dangerfield made a motion for a new trial, pursuant to Fed. R. Civ. P. 59(a) and (e). (AOB 357)[4]. The motion was made on the ground that the grant of AMOI's Rule 52(c) motion, dismissing AMOI from the case, was against the weight of the evidence and also on the ground that the District Court's award of nominal damages for emotional distress and general injury to reputation was "against the weight of the evidence and contrary to applicable law." (AOB 357-358). Concurrently with this motion, Dangerfield filed a motion for leave to amend the complaint to allege that SEI is the alter ego of AMOI for purposes of this litigation. (AOB 364, CR 204). The District Court denied both of Dangerfield's motions at a hearing on February 27, 1995 and in an order dated March 7, 1995. (App. D. at 14a-19a; App. C. at 12a-13a).

At the February 27 hearing, the District Court held that the decision and judgment which dismissed AMOI from the case

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[4] References preceded by "AOB" refer to the page number of Dangerfield's Excerpts of Record filed with the Ninth Circuit.

and awarded Dangerfield $45,002 in damages were not contrary to the evidence that was presented at trial and that Dangerfield failed to demonstrate that defendants implicitly consented to litigate the alter ego theory. (App. D at 19a). The Court also held that "the court's award of nominal damages for emotional distress and for general injury to reputation was in accordance with both the weight of the evidence and with applicable law." (App. C. at 12a). In the March 7 Order, the Court stated that, "*under all of the relevant criteria*, this is not an appropriate case for an award of punitive damages". (App. C at page 12a) (emphasis supplied).

Dangerfield appealed the Decision and Order of the District Court to the Ninth Circuit. In a well-reasoned decision and order dated September 5, 1996, the Ninth Circuit rejected each of Dangerfield's arguments. (App. B at 2a-10a). The Ninth Circuit held that the District Court did not abuse its discretion in denying Dangerfield's motion to amend the complaint because the issue of alter ego was not implicitly tried by the parties in this action. (App. B at 5a-6a). The Ninth Circuit also held that the District Court did not err in granting AMOI's Rule 52(c) motion noting that "there is no evidence that GP had any involvement at all in the investigation of, writing of, fact checking or other editing of the article." (App. B at 7a). Finally, the Ninth Circuit held that the District Court properly declined to assess punitive damages against SEI because Dangerfield had not presented any evidence that SEI's financial condition could support such an award. (App. B at 9a).

SUMMARY OF THE ARGUMENT

This Petition does not involve any constitutional issues or any other matters that would warrant this Court's review or attention. It is merely another attempt by Dangerfield to relitigate the facts of this case. The issue of alter ego is central to all of Dangerfield's arguments in this Petition. This issue was

not litigated at trial, and indeed, was raised for the first time only after the District Court declined to assess punitive damages against SEI. There is no dispute that AMOI had no involvement in the investigation, writing, fact checking or editing of the Article and thus, did not publish the article with actual (or constitutional) malice. Because AMOI has not been adjudged to be the alter ego of SEI, AMOI cannot be held liable for SEI's torts under this, or any similar theory. Finally, because the only evidence of financial condition that was submitted to support a claim for punitive damages was evidence of AMOI's financial condition, there was no error in the District Court's refusal to assess such damages against SEI.

Since the courts below carefully considered the facts of this case, and applied such facts to the well-established law, there is no basis for concluding that the decisions and orders of these courts represent a drastic departure from the accepted and usual course of judicial proceedings. Dangerfield's Petition should accordingly be denied in its entirely.

REASONS THE PETITION SHOULD BE DENIED

Rule 10 of the Supreme Court Rules permits the discretionary writ of certiorari to be granted "only for compelling reasons." Rule 10 further states:

> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower

> court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Dangerfield has failed to demonstrate that such compelling reasons for the granting of certiorari exist in this case. As set forth below, there is no important constitutional issue here. Indeed, the only issues involved in Dangerfield's appeal to the Ninth Circuit were issues of fact, namely whether the District Court abused its discretion or committed clear error in holding (1) that the issue of alter-ego liability had not been implicitly tried; (2) that AMOI had no responsible part in the publication of the libel; and (3) that there was insufficient evidence that SEI's financial condition could justify an award of punitive damages against that entity. Each of these *factual* issues was determined by the District Court based on well-established legal principles. The District Court's factual findings were affirmed by the Ninth Circuit in a well-reasoned opinion. Dangerfield's petition for a rehearing was denied.

Based on the guidelines set forth above, and as discussed below, there is nothing in this case which warrants this Court's review or attention. Dangerfield's Petition should be denied in its entirety.

I

DANGERFIELD'S POST-TRIAL MOTION TO AMEND THE COMPLAINT WAS PROPERLY DENIED BASED ON WELL-ESTABLISHED PRINCIPLES OF LAW AND A THOROUGH AND COMPLETE REVIEW OF THE RECORD

In his Petition, Dangerfield argues that certiorari is warranted here because "the District Court's refusal to entertain Dangerfield's alter ego arguments represents a drastic departure from the accepted and usual course of judicial proceedings." (Petition at 18). Dangerfield states that "[a]t trial, Dangerfield also argued that Star Editorial was the alter ego of GP. The District Court refused to entertain Dangerfield's alter ego arguments, because the District Court concluded that alter ego had not been specifically pled." (Petition at 7; *see also* Petition at 16).

In denying Dangerfield's post-trial motion to amend the complaint, both the District Court and the Court of Appeals followed the well-established principle that post-trial amendments to the pleadings may only be permitted to reflect issues litigated. Both courts relied on *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994) which holds that "[t]o establish implied consent the [plaintiff] must demonstrate that [the defendant] understood evidence had been introduced to prove [the new issue], and that [the new issue] had been directly addressed, not merely inferentially raised by incidental evidence." *Id.* (quoting *La Londe v. Davis*, 879 F.2d 665, 667 (9th Cir. 1989)).

Because both of the lower courts applied well-established legal principles in determining Dangerfield's motion, there is no error of law here. The only issue that remains is the factual determination of whether the alter ego issue was implicitly litigated.

With respect to this factual determination, Dangerfield's statement that the District Court denied his motion to amend the complaint because of Dangerfield's failure to *plead* alter ego misstates the record. Dangerfield's motion to amend his complaint was denied, not because he failed to *plead* alter ego but because the issue of alter ego *was never litigated*. Indeed, only after the trial in this case was concluded did Dangerfield move to amend the complaint pursuant to Fed. R. Civ. P. 15(b) (AOB 357-358) to allege that SEI was the alter ego of AMOI.[5] It is apparent that Dangerfield did this to then persuade the District Court to use the evidence of the financial condition of AMOI to assess punitive damages against SEI, because Dangerfield did not present sufficient evidence of the financial condition of SEI at trial. (See discussion contained herein in Section III).

The Ninth Circuit accurately summarized the record in this case when it concluded that the District Court correctly held that the issue of alter ego had not been litigated. The Court stated as follows:

> The complaint does not allege alter ego theory. The jointly filed Pre-Trial Conference Order does not list alter ego as an issue of law or fact to be litigated at trial. Dangerfield primarily refers this Court to David Galpern's deposition. This deposition does not show that there was implied consent to litigate alter ego. The evidence brought out in the deposition was also relevant to other issues in the trial. Pursuant to *In re Acequia*, GP and Star did not

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[5] Respondents object to Dangerfield's continued reference throughout his Petition to what he believes is evidence of the fact that AMOI was the alter ego of SEI. (*See* Petition, footnote 3). Such discussion is wholly improper when those arguments were not litigated in the District Court and were only raised for the first time on appeal, without a supporting record. Accordingly, because consideration of the alter ego issue is wholly improper, Respondents will not address Dangerfield's alter ego arguments.

> implicitly consent to litigating alter ego. Only on appeal does Dangerfield present his alter ego arguments. The district court did not abuse its discretion by denying Dangerfield's post-judgment motion to amend his complaint to allege liability on an alter ego theory.

(App. B. at 5a).

Thus, the issue here is not, as Dangerfield contends, a case of drastic departure from the accepted and usual course of judicial proceedings or an erroneous application of the law, but rather, this is a case of the District Court, and the Ninth Circuit disagreeing with Dangerfield's version of the facts. Such an issue is clearly not one in which certiorari is warranted.

II

THERE HAS BEEN NO EXPANSION OF THE ACTUAL MALICE STANDARD SET FORTH IN *NEW YORK TIMES CO. V. SULLIVAN* SO AS TO WARRANT THIS COURT'S REVIEW

Dangerfield contends that this Court should grant his Petition because the courts below improperly "extended" (Petition at 12) the constitutional malice standard by dismissing AMOI from the case, enabling AMOI, a "co-publisher" of the libel, to avoid liability for its actions. (Petition at 10-16). Dangerfield's argument is based on his claim (which, as discussed above, was never litigated) that AMOI is the alter ego of SEI. Based on his alter ego theory, Dangerfield disputes the holdings of both lower courts that AMOI did not play a responsible part in the publication of the libel and did not act with constitutional malice in publishing the Article.

Contrary to Dangerfield's contention, the holdings of the courts below are absolutely consistent with the principles set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

and its progeny. These cases hold that in order to hold a defendant liable for defaming a public figure, the plaintiff must demonstrate, with clear and convincing evidence, that *the defendant* acted with constitutional malice—that is, with knowledge of the falsity of the statement or publication with reckless disregard for its truth or falsity. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991); *Cantrell v. Forest City Publ'g. Co.*, 419 U.S. 245, 251-254 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).[6]

Based on the facts presented at trial, the District Court concluded that AMOI took no responsible part in causing the Article to be published, recognizing that AMOI's involvement in the non-editorial aspects of publishing and distributing *Star* gave AMOI no knowledge of the libel.[7] (App. E at 22a). The Court of Appeals affirmed, holding that:

> Dangerfield seems to argue that simply because GP published the article, it is necessarily liable. But under *Cantrell*, publication alone is not enough; rather,

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[6] Not surprisingly, in all of the cases that Dangerfield cites in his Petition, the courts held that only entities that played a responsible role in the publication could be held liable for the defamation. *See Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 476 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988), *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 533, 435 N.Y.S.2d 556 (1980), *Prozeralik v. Capital Cities Communications, Inc.*, 188 A.D.2d 178, 183, 593 N.Y.S.2d 662, 665 (4th Dept.), *rev'd*, 82 N.Y.2d 466, 605 N.Y.S.2d 218 (1993) and *Crain v. Lightner*, 178 W.Va. 765, 772, 364 S.E.2d 778 (1987).

[7] Dangerfield argues that the District Court incorrectly relied on *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 200 Cal. Rptr. 674 (1984) and that *Osmond* actually supports his argument. (Petition at 13). In *Osmond* the court applied the well-recognized principle that, absent knowledge of the falsity or reckless disregard for the truth, civil liability may not be imposed upon a retail distributor of libelous materials. *Osmond*, 153 Cal. App. 3d at 851, 200 Cal. Rptr. at 679. *Osmond* is absolutely consistent with the principles at issue here. As established in *Osmond*, because AMOI did not have any knowledge of the defamatory material before publication, it cannot be held responsible for the libel.

> Dangerfield must also prove that GP acted with malice. We have reviewed the record and agree that there is no evidence that GP acted with malice. The editorial responsibility was strictly with Star. There is no evidence that GP had any involvement at all in the investigation of, writing of, fact checking or other editing of the article. At most the evidence shows that GP supervised the non-editorial aspects of publishing and distributing Star Magazine.

(Appendix B at 6a-7a).

Dangerfield's claim that AMOI should be responsible for the libel on a *respondeat superior* or agency theory is merely a restatement of Dangerfield's alter ego argument. (Petition at 11-16). Although the doctrine of *respondeat superior* is applicable in defamation cases (*see Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974)), the doctrine does not apply here because SEI, not AMOI, employed the reporters or editors involved in writing the Article. The Ninth Circuit summarized Dangerfield's *respondeat superior* and agency arguments best when it held that these "arguments also lack merit and seem largely premised on an alter-ego finding, which, as set forth above, was not tried to the district court." (Appendix B at 7a).

Again, because the role that AMOI had in publishing the defamatory material is a factual inquiry, there is no issue of law or improper application of the law that would warrant this Court's review.

III

THERE IS NO CONFLICT IN THE LAW WHICH WARRANTS THIS COURT'S REVIEW OF THE LOWER COURT'S REFUSAL TO AWARD DANGERFIELD PUNITIVE DAMAGES

Dangerfield contends that by declining to assess punitive damages against SEI, the Ninth Circuit's decision conflicts with the decision of the California Supreme Court in *Adams v. Murakami*, 54 Cal. 3d 105, 284 Cal. Rptr. 318 (1991), thus warranting this Court's review. Dangerfield's argument has no merit. The decisions of the lower courts were absolutely consistent with *Adams* which holds that evidence of a defendant's financial condition is a prerequisite to imposing a punitive damage award and also holds that the plaintiff has the burden of proof to establish the defendant's financial condition. *Adams*, 54 Cal. 3d at 100-11, 284 Cal. Rptr. at 327.[8]

Here, citing *Kenly v. Ukegawa*, 16 Cal. App. 4th 49, 19 Cal. Rptr. 2d 771 (1993) the District Court held that it could not impose punitive damages against SEI because "plaintiff failed to submit evidence that the financial net worth of SEI would allow the imposition of punitive damages." (App. E. at 26a). In other words, plaintiff failed to meet his burden of establishing that an award of punitive damages against SEI[9] was

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[8] As the Ninth Circuit recognized "Dangerfield's argument that the district court erroneously used the 'net worth' standard instead of the financial condition of Star is meritless. *See Kenly v. Ukegawa*, 16 Cal. App. 4th 49, 19 Cal. Rptr. 2d 771, 777 (1993) (discussing that a 'net worth' approach to assessing the financial condition is appropriate)."

[9] Dangerfield's claim that SEI "is now the new name of an *inactive* subsidiary of AMOI" (Petition at 26) is inaccurate. SEI is the name of an active subsidiary of AMOI which is responsible for the editorial content of *Star*. In any event, Dangerfield's argument concerning whether after the Article was published there was a "Star" division of AMOI is without any merit whatsoever.

appropriate in light of its financial condition. The District Court also held that "under all the relevant criteria, this is not an appropriate case of punitive damages." (App. C at 12a).

The Ninth Circuit affirmed the District Court's holding, noting that although Dangerfield presented evidence of SEI's financial condition, this evidence indicated that SEI operated at a net loss. (App. B at 8a). The only evidence of profitability that Dangerfield presented was evidence of AMOI's profitability which could not be considered because "alter ego was not litigated or determined at trial". (App. B at 9a). As the Ninth Circuit stated,

> Including GP's financial condition in the determination of punitive damages for Star is not appropriate. Dangerfield's introduction of GP's net worth, without isolating Star's balance, cannot sustain punitive damages without litigating alter ego. Furthermore, the district court dismissed GP from the action on the merits. Given that the evidence presented showed that Star operated at a net loss, Dangerfield failed to establish Star's ability to pay punitive damages. The district court did not err when it declined to award punitive damages against Star.

(Appendix B at 9a). As the Ninth Circuit correctly held, it is well-established that the financial condition of a parent corporation may not be considered in a determination of whether to award punitive damages against the subsidiary. *See Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1284-86, 31 Cal. Rptr. 2d 433, 442-444 (1994).

Again, whatever documents or evidence of SEI's financial condition exists, is a factual dispute, and not an issue of constitutional significance or an issue which warrant this Court's attention.

CONCLUSION

For the reasons set forth above, respondents Star Editorial, Inc. and American Media Operations, Inc. respectfully request that Rodney Dangerfield's petition for a writ of certiorari be denied.

Dated: March 25, 1997

Respectfully submitted,

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